

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RODERICK LOUIS PIPPEN,

Defendant-Appellant.

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UNPUBLISHED

April 30, 2020

No. 347729

Wayne Circuit Court

LC No. 10-006891-01-FC

Before: M. J. KELLY, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

In May 2014, defendant, Roderick Pippin, was convicted by a jury of first-degree murder, MCL 750.316(1)(b), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of a firearm by a felon (felon-in-possession), MCL 750.224f. Pippin moved for a new trial, arguing that his trial lawyer was ineffective for failing to investigate or present testimony from Michael Hudson, whom Pippin believed would have impeached Shane McDuffie’s testimony identifying Pippin as the individual who shot and killed Brandon Sheffield. Following a *Ginther*<sup>1</sup> hearing, the trial court found that Pippin had not established that his trial lawyer was ineffective. Pippin appealed to this Court, which affirmed his conviction.<sup>2</sup> Thereafter, our Supreme Court reversed this Court’s determination that Pippin’s trial lawyer’s performance was objectively reasonable, and vacated this Court’s conclusion that Pippin had failed to establish that he was prejudiced by the allegedly deficient performance. *People v Pippin*, 501 Mich 902 (2017). The Court remanded the case to the trial court with directions to determine “whether, considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected.” *Id.* On remand, the trial court concluded that, based on the totality of the circumstances, it was not persuaded that there was a reasonable probability that the outcome of Pippin’s trial would have been different. Accordingly, the court affirmed Pippin’s convictions

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>2</sup> *People v Pippin*, unpublished per curiam opinion of the Court of Appeals, issued on January 14, 2016 (Docket No. 321487), rev’d in part and vacated in part 501 Mich 902 (2017).

and sentences. This appeal by right follows. Because there are no errors warranting reversal, we affirm.

## I. BASIC FACTS

The basic facts were set forth in our prior opinion:

On July 21, 2008, Brandon Sheffield was fatally shot during an apparent attempted carjacking in Detroit. The victim was shot while seated in his Mercury Mountaineer with a friend and two other individuals whom he just met the day before. The group was watching a video on a laptop computer in the parked Mountaineer, with the engine running, when a gunman approached the driver's side and demanded that everyone get out. The victim was shot in the head while still in the driver's seat of the Mountaineer, which crashed into a tree.

Defendant was arrested three months later after a Detroit police officer observed defendant and Michael Hudson both throw guns under a vehicle in the area of Fairport and East Seven Mile Road in Detroit. The officer claimed that the gun thrown by defendant was determined to be the gun used to shoot the victim. During the police investigation of defendant's associates after his arrest, an officer took a statement from Shane McDuffie regarding the shooting incident. [*Pippen II*, unpub op at 1-2.]

At trial, when the prosecution asked McDuffie whether he was present when Pippen shot someone, McDuffie answered "no." However, when confronted with his four-page written statement, McDuffie admitted that he was present when Pippen shot Sheffield.

## II. INEFFECTIVE ASSISTANCE

### A. STANDARD OF REVIEW

Pippen argues that the trial court erred by finding that Hudson was not a credible witness and that a reasonable jury would not credit his testimony. Pippen insists that Hudson's testimony would have constituted exculpatory evidence, and that it would have directly contradicted and impeached McDuffie's testimony. "Generally, an ineffective-assistance-of-counsel claim presents a mixed question of fact and constitutional law." *People v Hoang*, 328 Mich App 45, 63; 935 NW2d 396 (2019) (quotation marks and citation omitted). We review de novo constitutional questions. *Id.* "[F]indings of fact are reviewed for clear error." *Id.* "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Evaluation of the merits of a defendant's claim of ineffective assistance should be based on "a full review of the evidence revealed at the evidentiary hearing." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

### B. ANALYSIS

"[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (quotation marks and citation omitted). In order to establish the right to a new trial premised on ineffective assistance of counsel,

“a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *Trakhtenberg*, 493 Mich at 51.<sup>3</sup>

“A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 US at 694. “The likelihood of a different result must be substantial, not just conceivable.” *Harrington v Richter*, 562 US 86, 112; 131 S Ct 770; 178 L Ed 2d 624 (2011). The fact that a defense lawyer “performed deficiently in presenting a viable defense does not automatically require the conclusion that there is a reasonable probability that the result of the proceeding would have been different absent counsel’s deficient performance.” *People v Dendel*, 481 Mich 114, 125 n 9; 748 NW2d 859 (2008). The determination of prejudice in the context of a claim of ineffective assistance requires a consideration of the totality of the circumstances:

Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. [*Strickland*, 466 US at 695-696.]

On appeal, Pippen primarily asserts that Hudson’s testimony would have impeached McDuffie’s testimony and raised significant credibility issues regarding McDuffie’s version of the events. We disagree. At the *Ginther* hearing, Hudson generally denied ever observing Pippen shoot anyone, and generally asserted McDuffie’s claims were false. Hudson’s testimony would have likely had a minimal effect on the credibility of McDuffie’s version of the events, considering Hudson’s general denials do not amount to an assertion that Pippen did not shoot the victim. *Strickland*, 466 US at 695-696.

Further, the trial court found that Hudson’s testimony lacked credibility and that finding is supported by the record. Hudson had multiple prior convictions that contained an element of theft, which seriously impacted Hudson’s credibility. MRE 609 governs impeachment by evidence of conviction of a crime. It provides:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless

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<sup>3</sup> Our Supreme Court has already determined that Pippen’s lawyer’s performance was objectively unreasonable; therefore, we will only address whether the trial court erred in analyzing the prejudice prong of *Strickland*.

the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) Determining probative value and prejudicial effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

(c) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date. [*Id.*]

"Theft crimes are minimally probative on the issue of credibility, and, therefore, they are admissible only if the probative value of the evidence outweighs the prejudicial effect." *Meshell*, 265 Mich App at 635. Here, Hudson was convicted of receiving and concealing stolen property in 2003, receiving and concealing stolen property in 2004, and one or two counts of larceny from a motor vehicle in 2005. Under MRE 609(c), Hudson's 2003, 2004, and 2005 theft-related convictions were relevant to the trial court's credibility determination, since it is possible that no more than ten years would have elapsed from the date of his convictions, or his release from the confinement imposed for those convictions, at the time of Pippen's trial.

Although Pippen asserts that the court's finding that Hudson's credibility was impacted by his prior convictions, the court failed to consider that McDuffie also had a criminal history. Yet, Pippen fails to realize McDuffie was on probation for a carrying a concealed weapon (CCW) conviction. Under MRE 609, prior convictions containing elements of dishonesty or theft are admissible to impeach a witness. MRE 609(a)(1) and (2). Because CCW is not a theft crime, McDuffie's credibility may not have been impeached on the basis of his CCW conviction. Not all criminal history is equally probative of a witness's credibility.

The trial court also found Hudson's credibility was further impacted by the unbelievability of his testimony. Specifically, the court found it was unbelievable that Hudson was unable to

recall the details of Pippen's conduct when he and Pippen were arrested on October 18, 2008. Hudson denied recalling whether Pippen threw a gun or anything else underneath the same vehicle that Hudson threw his .38-caliber pistol. The trial court noted Sergeant Eric Bucy's testimony called into question the veracity of Hudson's denials. Bucy testified that Hudson and Pippen stepped between two cars and stood in close proximity to each other when Pippen discarded the murder weapon ("a Glock Nine") and Hudson discarded a .38-caliber pistol. After Pippen and Hudson both discarded guns underneath the same vehicle, Pippen and Hudson walked away, in different directions, immediately before their arrest.<sup>4</sup>

The trial court also found Hudson was not a credible witness, given that at the time of Pippen's February 23, 2015 evidentiary hearing, Hudson had been a parole absconder for over seven months. Although Pippen suggests that Hudson's willingness to testify despite the fact that he would likely (and in fact was) arrested for absconding is evidence suggesting that he was telling the truth, the trial court did not find that to be true. If anything, his willingness to risk incarceration in an attempt to assist his friend, Pippen, shows that he was a biased witness.

Hudson's testimony was also not necessary to impeach McDuffie's testimony because McDuffie was a hostile witness. The prosecution secured McDuffie's testimony on a material witness detainer. During trial, McDuffie testified he did not want to be present. When the prosecution asked McDuffie whether he was present when defendant shot someone, McDuffie said "No." It was only after the prosecution reminded McDuffie of his four-page written statement of August 25, 2009, that McDuffie admitted he was present when Pippen shot Sheffield. In addition, during trial, Pippen's lawyer repeatedly challenged McDuffie's credibility by showing McDuffie may have been motivated to provide inculpatory testimony, in exchange for release from probation. McDuffie also could not recall the name of the street on which the crime took place, the type of truck Sheffield was in, Sheffield's physical description, or the type of truck McDuffie, Pippen, and Hudson were in when Pippen shot the victim. Further, impacting McDuffie's credibility was the aspects of his testimony that contradicted the three eyewitnesses' testimonies. McDuffie denied Pippen wore a face mask when he shot Sheffield, stated neither he nor Hudson displayed weapons when Pippen stepped out of the vehicle and shot Sheffield, and asserted only he, Hudson, and Pippen were inside of the vehicle at the time of the shooting. In contrast, the eyewitnesses testified Pippen wore a white face mask, three other people were inside of the dark-colored vehicle Pippen was in, and the three other vehicle occupants wore face masks and pointed handguns at Sheffield's vehicle. Considering the scope of Pippen's lawyer's impeachment efforts at trial, Pippen has not demonstrated a reasonable probability that Hudson's general denial of the veracity of McDuffie's testimony would have further impeached McDuffie or produced a different result at trial. *Trakhtenberg*, 493 Mich at 55-56.

Finally, Pippen directs this Court to *People v Johnson*, 502 Mich 541; 918 NW2d 676 (2018). Relying on *Johnson*, Pippen contends the trial court misconstrued the limitations on its ability to make credibility determinations in determining the propriety of granting a new trial. He

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<sup>4</sup> Moreover, Hudson's testimony denying seeing Pippen discard the murder weapon does not obviate Pippen's possession of the murder weapon. Bucy observed the Glock Nine protruding from Pippen's waistband, and Hudson admitted to discarding the .38-caliber handgun.

asserts the trial court overstepped its gatekeeping role in finding that Hudson was not credible and that no reasonable juror could find Hudson's testimony to be credible. *Johnson*, however, is not applicable here, as it is a case addressing review of newly-discovered evidence that would be presented on retrial.

Overall, under the totality of the circumstances, there is not a reasonable probability that a different result would have been likely had Hudson testified. McDuffie's testimony was already significantly impeached to the point where Hudson's general proclamation that McDuffie's testimony was false and his general denial of ever seeing Pippen shoot someone, would not have resulted in a massive loss of credibility. Moreover, the fact that Pippen and Hudson were together approximately three months later when Pippen was arrested for discarding the murder weapon bolstered the prosecution's case. Hudson's testimony at the evidentiary hearing that he did not see Pippen discard his gun was found to be patently incredible, given that a police officer testified that the two men were in close proximity and discarded their guns under the same vehicle. Finally, Hudson's history of theft crimes would have further impeached his veracity, and his status as a parole absconder willing to risk incarceration to testify for his friend shows that he was a loyal and biased friend. Thus, viewing the totality of the circumstances, the court did not err by finding Pippen had failed to establish the prejudice prong of his ineffective-assistance claim.

Affirmed.

/s/ Michael J. Kelly  
/s/ Kirsten Frank Kelly  
/s/ Deborah A. Servitto